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4

5 UNITED STATES DISTRICT COURT
6 DISTRICT OF COLORADO

7 Huang, Guan
8 Petitioner,
9 V.
10 KRISTI NOEM, Secretary of
11 the United States Department of Homeland
Security; PAM BONDI,
12 United States Attorney General;
TODD LYONS, Director of
13 United States Immigration and Customs
Enforcement; Kelei Walker,
14 Field Office Director for Detention and
Removal, U.S. Immigration and Customs
15 Enforcement, Department of Homeland
Security; Juan Baltasar Warden,
16 Denver Contract Detention Center;
17 UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; UNITED
18 STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT;
19 Respondents

A  Detained

Case File No.:

Immigration file No.:



**PETITIONER'S
MOTION FOR
PRELIMINARY
INJUNCTION**

EMERGENCY MOTION

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21 Petitioner seeks a preliminary injunction that requires Respondents to release
22 him on parole under 8 USC §1226 (a)(2)(B) or, in the alternative, to provide Mr.
23 Huang a bond hearing under 8 USC §1226 (a)(2)(A), enjoining Respondents from
24 applying *Matter of Q. Li*.
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1 Although Petitioner is charged as removable under Sections 212(a)(6)(A)(i)
2 of the INA as present without admission or parole, is not classified as an “arriving
3 alien”, and was detained by ICE pursuant to an administrative arrest warrant under
4 Section 236 of the INA and 8 U.S.C. § 1226.
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6 Section 1226’s plain language says that the Department of Homeland
7 Security (DHS) may detain a noncitizen pending a hearing on that person’s
8 admissibility. In fact, the statute explicitly extends to people who are inadmissible
9 because they entered unlawfully. This section also conveys a statutory right to a
10 bond hearing.
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12 The Court should not require administrative exhaustion.
13 Appeals to the Board of Immigration Appeals (BIA or the Board) inflict the very
14 harm Petitioner seeks to avoid, where appeals take six months or more to resolve.
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16 **STATEMENT OF FACTS**

17 Detention under § 1226(a) includes the right to a bond hearing before a
18 neutral decisionmaker— specifically, an IJ. 8 C.F.R. § 1236.1(d). At that hearing,
19 the noncitizen may present evidence of their ties to the United States, lack of
20 criminal history, and other factors that show they are not a flight risk or danger to
21 the community. *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).
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23 Meanwhile, BIA appeals do not provide any meaningful relief where nearly
24 all cases are mooted out.
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1 **ARGUMENT**

2 To obtain a preliminary injunction, Petitioner must demonstrate that (1) they
3 are likely to succeed on the merits, (2) are likely to suffer irreparable harm in the
4 absence of preliminary relief, (3) the balance of equities tips in their favor, and (4)
5 an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555
6 U.S. 7, 20 (2008). Even if Petitioner raises only “serious questions going to the
7 merits,” the Court can nevertheless grant relief if the balance of hardships tips
8 “sharply” in his favor, and the remaining equitable factors are satisfied. *Id.*

9 **I. Petitioner satisfies all the factors required for a preliminary injunction.**

10 **A. Petitioner is likely to succeed on the merits of their argument that**
11 **ICE and EOIR are violating his Due Process.**

12 The plain text of § 1226 demonstrates that its subsection (a) applies to
13 Petitioner. By its own terms, § 1226(a) applies to anyone who is detained “pending
14 a decision on whether the [noncitizen] is to be removed from the United States.” 8
15 U.S.C. § 1226(a).

16 Because Respondents detained Petitioner pursuant to an administrative arrest
17 warrant under this section, he is entitled to a bond hearing.

18 **B. Petitioner will suffer irreparable harm absent an injunction.**

19 Parties seeking preliminary injunctive relief must also show they are “likely
20 to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at
21 20. Irreparable harm is the type of harm for which there is “no adequate legal
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1 remedy, such as an award of damages.” *Id.*

2 Detention constitutes a loss of liberty that is irreparable.

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4 Petitioner’s detention constitutes such a harm, as “civil commitment for any
5 purpose constitutes a significant deprivation of liberty that requires due process
6 protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979). Indeed, “[f]reedom
7 from imprisonment—from government custody, detention, or other forms of
8 physical restraint—lies at the heart of the liberty” that the Due Process Clause
9 protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). For this reason, the
10 Supreme Court has repeatedly made clear that prolonged deprivations of liberty—
11 like those that noncitizens regularly experience—require a timely hearing to test
12 the legality of detention before a “neutral and detached magistrate.” *Gerstein v.*
13 *Pugh*, 420 U.S. 103, 112 (1975); see also *Cnty. of Riverside v. McLaughlin*, 500
14 U.S. 44, 55–56 (1991) (similar); *Gonzalez v. United States Immigr. & Customs*
15 *Enft.*, 975 F.3d 788, 823–26 (9th Cir. 2020) (holding that *Gerstein* applies to the
16 detention of noncitizens on a detainer); *Zadvydas*, 533 U.S. at 690 (detention
17 requires a hearing before an independent decisionmaker to assess whether the
18 detention “bear[s] [a] reasonable relation” to a valid government purpose, such as
19 preventing flight or protecting the community against dangerous individuals
20 (alterations in original) (*quoting Jackson v. Indiana*, 406 U.S. 715, 738 (1972)));
21 *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding Bail Reform Act’s
22 pre-trial civil detention scheme precisely because it required the government to
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1 justify detention in a “full-blown adversary hearing” before a “neutral
2 decisionmaker”—a federal judge).

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4 Petitioner’s claims raise constitutional concerns, for civil detention “violates
5 due process outside of ‘certain special and narrow nonpunitive circumstances.’”
6 *Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018) (citation omitted). These
7 constitutional concerns reflect irreparable harm, with strong likelihood of success
8 on his claim that he is being held under § 1226.
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10 Detention has also taken an emotional and mental toll on Petitioner, who
11 reports significant emotional trauma and physical struggles. Such emotional stress,
12 depression and reduced sense of well-being further support a finding of irreparable
13 harm.
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16 **C. The balance of hardships and public interest weigh heavily in Petitioner’s**
17 **favor.**

18 The final two factors for a preliminary injunction—the balance of hardships
19 and public interest—“merge when the Government is the opposing party.” *Nken v.*
20 *Holder*, 556 U.S. 418, 435 (2009). Here, Petitioner face weighty hardships: loss of
21 liberty, separation from family, significant stress and anxiety, and difficulty in
22 obtaining an attorney.
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25 The government, by contrast, faces minimal hardship: the administrative
26 costs associated with bond hearings. “[T]he balance of hardships tips decidedly in
27 Petitioner’s favor” when “[f]aced with such a conflict between financial concerns
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1 and preventable human suffering.” *Hernandez*, 872 F.3d at 996 (quoting *Lopez v.*
2 *Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).
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4 Accordingly, the balance of hardships and the public interest
5 overwhelmingly favor injunctive relief to ensure that Respondents comply with
6 federal law and afford Petitioner release on bond.
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8 **II. Prudential exhaustion is not required.**

9 There are a number of exceptions to the general rule requiring exhaustion,
10 covering situations such as where administrative remedies are inadequate or not
11 efficacious, or irreparable injury will result.
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13 In addition, a court may waive an exhaustion requirement when “requiring
14 resort to the administrative remedy may occasion undue prejudice to subsequent
15 assertion of a court action.” *McCarthy v. Madigan*, 503 U.S. 140, 146–47 (1992),
16 superseded by statute on other grounds as stated in *Booth v. Churner*, 532 U.S.
17 731, 739–41 (2001). “Such prejudice may result . . . from an unreasonable or
18 indefinite
19 timeframe for administrative action.” *Id.* at 147 (citing cases). Here, the exceptions
20 regarding irreparable injury and agency delay apply and warrant waiving any
21 prudential exhaustion requirement.
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25 As with the irreparable harm analysis, “in cases involving a constitutional
26 claim, a likelihood of success on the merits . . . strongly tips the balance of equities
27 and public interest in favor of granting a preliminary injunction.” *Baird*, 81 F.4th at
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1 1048.

2 **A. Irreparable Injury**

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4 The first exception to any prudential exhaustion requirement that applies
5 here is that of irreparable injury. Each day Petitioner remains in detention is one in
6 which their statutory rights have been violated and they could be free. Similarly
7 situated district courts have repeatedly recognized this fact. Because of delays
8 inherent in the administrative process, BIA review would result in the very harm
9 that the bond hearing was designed to prevent: prolonged detention without due
10 process. Indeed, if Petitioner is correct on the merits of his habeas petition, then
11 Petitioner has already been unlawfully deprived of a lawful bond hearing, and each
12 additional day that Petitioner is detained would cause him harm that cannot be
13 repaired.
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17 Other district courts have echoed these points. At issue in this case is civil
18 detention, which “violates due process outside of ‘certain special and narrow
19 nonpunitive circumstances.’” *Rodriguez*, 909 F.3d 5 See, e.g., *Perez v. Wolf*, 445
20 F. Supp. 3d 275, 286 (N.D. Cal. 2020); *Blandon v. Barr*, 434 F. Supp. 3d 30, 37
21 (W.D.N.Y. 2020); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 961 (N.D.
22 Cal. 2019); *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1003–04 (N.D. Cal.
23 2018); *Montoya Echeverria v. Barr*, No. 20-CV-02917-JSC, 2020 WL 2759731, at
24 *6 (N.D. Cal. May 27, 2020); *Rodriguez Diaz v. Barr*, No. 4:20-CV-01806-YGR,
25 2020 WL 1984301, at *5 (N.D. Cal. Apr. 27, 2020); *Birru v. Barr*, No. 20-CV-
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1 01285-LHK, 2020 WL 1905581, at *4 (N.D. Cal. Apr. 17, 2020); *Lopez Reyes v.*
2 *Bonnar*, No. 18-CV-07429-SK, 2018 WL 7474861, at *7 (N.D.

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4 Cal. Dec. 24, 2018). at 257 (quoting *Zadvydas*, 533 U.S. at 690). Petitioner has a
5 “fundamental” interest in such a hearing, as “as “freedom from imprisonment is at
6 the ‘core of the liberty protected by the Due Process Clause.’”

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8 *Hernandez*, 872 F.3d at 993 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80
9 (1992)). This point is “beyond dispute.” *Id.*; see also *Marin*, 909 F.3d at 256–57.

10 Moreover, the irreparable injury Petitioner faces extends beyond a chance at
11 physical liberty. These are several “irreparable harms imposed on anyone subject to
12 immigration detention[.]” *Hernandez*, 872 F.3d at 995. These include “subpar
13 medical and psychiatric care in ICE detention facilities,” as well as the “collateral
14 harms to children of detainees whose parents are detained.” *Id.*

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17 **B. Agency Delay**

18 Second, the BIA’s delays in adjudicating bond appeals warrant excusing any
19 exhaustion requirement. The court’s ability to waive exhaustion based on delay is
20 especially broad here given the interests at stake. Supreme Court precedent
21 “permits a court under certain prescribed circumstances to excuse exhaustion
22 where ‘a claimant’s interest in having a particular issue resolved promptly is so
23 great that deference to the agency’s judgment [of a lack of finality] is
24 inappropriate.’” *Klein v. Sullivan*, 978 F.2d 520, 523 (9th Cir. 2002).

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28 Moreover, the Supreme Court has explained that “[r]elief [when seeking

1 review of detention] must be speedy if it is to be effective.” *Stack v. Boyle*, 342
2 U.S. 1, 4 (1951).

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4 Despite this fundamental interest and the Supreme Court’s admonition that
5 only speedy relief is meaningful, the BIA takes over half a year in most cases to
6 adjudicate an appeal of a decision denying bond. Its own data demonstrates this
7 fact.

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9 Waiting several months, half a year, or even a year to review a custody
10 determination is not reasonable; to the contrary, it exhibits significant disregard for
11 the “fundamental” interests at stake. The Ninth Circuit has signaled that the
12 protections afforded to criminal Respondents in pre-trial civil detention should
13 apply in the civil immigration context. In *Gonzales v. U.S. Immigration & Customs*
14 *Enforcement*, the Court of Appeals held that the Fourth Amendment “requires a
15 prompt probable cause determination by a neutral and detached magistrate to
16 justify continued detention” of a noncitizen facing removal. 975 F.3d at 798; see
17 also *id.* at 823–26. Similar principles demonstrate why the BIA’s review here is so
18 patently unreasonable. The protections and quick review of detention orders
19 afforded criminal Respondents are rooted in the Fifth Amendment’s
20 Due Process Clause, see *Salerno*, 481 U.S. at 746–47, and many of those principles
21 unquestionably apply to noncitizens, see, e.g., *Zadvydas*, 533 U.S. at 690–91
22 (repeatedly citing *Salerno* and other Fifth Amendment civil detention caselaw).
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24 Thus, as with the rights at issue in *Gonzalez*, the rights of federal criminal
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1 Respondents facing pretrial civil detention demonstrate that the BIA’s months- or
2 even years-long review of a noncitizen’s civil detention is an
3
4 “unreasonable . . . timeframe for administrative action.” *McCarthy*, 503 U.S. at
5 147.

6 Finally, Petitioner notes that under either basis for waiving exhaustion, the
7 history of appeals related to this issue supports him. Respondents have unclean
8 hands and should not benefit from their failure to abide by appellate authority. This
9 reality only further underscores the need for immediate relief and the propriety of
10 waving any exhaustion requirement.
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13 **CONCLUSION**

14 For the foregoing reasons, Petitioner respectfully requests the Court grant his
15 motion for a preliminary injunction and:
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17 1. Issue an order as to Petitioner, requiring that Respondents release Mr. Huang on
18 parole under 8 USC §1226 (a)(2)(B) or, in the alternative, to provide Mr. Huang a
19 bond hearing under 8 USC §1226 (a)(2)(A) within three (3) days,
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21 2. Issue an injunction that enjoins Respondents from denying his bond based on
22 *Matter of Q. Li*.

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1 Respectfully submitted,

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CERTIFICATION FOR EMERGENCY MOTION

(1) Petitioner is unlawfully detained, and every day his irreparable harm is compounded, where no remedy of law can make him whole;

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(3) and Petitioner, through counsel, has attempted to meet-and confer with Respondents, who remain unreachable and who have made it abundantly clear that they will not consider voluntarily releasing any detained immigrants who entered without inspection. Petitioner has been unable to resolve the matter without court action.

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